IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 137

FRANK WOLF,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank, Detroit,
Respondent and Appellee below

PETITION OF FRANK WOLF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Interstate Brief & Record Co., Case Bldg., 482 Fort St. W., Detroit

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To: The Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

I. Petitioner was the owner in 1933, of certain shares of Detroit Bankers Company.

II. The Honorable United States Circuit Court of Appeals for the Sixth Circuit held in 1936, that the owners of Detroit Bankers Company shares, were liable to assessment as the actual owners of the shares of First National Bank-Detroit.

See—*Barbour v. Thomas,* 86 F. (2) 510.

III. Receiver Schram brought suit against petitioner on January 21st, 1938, to collect this assessment liability from him.

IV. Petitioner and Appellant claimed in the Lower Court that the Receiver had sufficient assets in his hands (without collecting any assessment liability from Petitioner) with which to pay all depositors one hundred cents on the dollar—and that, therefore,

(a) The Receivers suit was, of necessity, one to collect interest on the deposits of the closed bank.

(b) And, that as such, it was a suit for damages for the detention of the depositors' money.

See—*Ticonic National Bank v. Sprague,* 303 U. S. 406, 410.

(c) And so, under the Statute of Limitations of Michigan, was barred three years after July 31, 1933.

V. And Petitioner asked leave of the District Court, to make the Comptroller of the Currency a party defendant in the Receiver's suit against him—so that he could show that the Receiver was merely collecting interest on deposits (over 100 per cent of the principal) and thus damages for detention of the depositors' money—

which suit for damages was barred by the Michigan Limitation Statutes, as he claimed.

And Petitioner and Appellant sought to have said Comptroller of the Currency made a party in the Michigan District Court—for that purpose—on the authority of—

O'Connor v. Comptroller, 81 Fed. (2) 833 (5 C. C. A.), Cert. denied 298 U. S. 657.
First Nat. Bank v. Williams, 252 U. S. 504.

in order that Petitioner might bring himself within the rule of *Crawford v. Gamble,* 57 Fed. (2) 15, 17 (6 C. C. A.), where it was said:

> "If it should be true as alleged that the note was executed to secure the New Bank against loss on account of assets received from the Old Bank, but that such assets actually equal in value the amount at which they were turned over, and that therefore no necessity exists for an assessment to pay the note, then upon these facts being brought home to the proper authorities appellant may doubtless be granted appropriate relief."

VI. The Lower District Court, on December 5, 1938, denied Petitioner's said Motion to make the Comptroller a party—without stating reasons for his denial.

(Record on Appeal, page 36.)

VII. Upon the entry of judgment for the Receiver, Petitioner and Appellant appealed generally from the judgment entered against him in the District Court.

See his Notice of Appeal—Record on Appeal, page 75.

VIII. But the Circuit Court of Appeals for the Sixth Circuit entered judgment on March 14, 1940, affirming the Lower Court's judgment—without any opinion on the merits—by an order as follows:

"Before Hicks, Allen and Arant.

This case came on for hearing upon the record, briefs and arguments of counsel, and it appearing that it arises out of the same state of facts as *Barbour v. Thomas,* 86 F. (2d) 510, a class suit decided by this Court; and it appearing that a motion that the Comptroller of the Currency of the United States be made a party to this suit was denied and no appeal taken therefrom;

It is ordered and adjudged that the order and judgment of the District Court be affirmed.

Approved for entry:

H. W. Arant
United States Circuit Judge

Filed: March 14, 1940."

IX. And your Petitioner and Appellant most respectfully submits to this Honorable Supreme Court—

that such a disposition of his Appeal is unjustified, and one which no litigant in any United States Court, however humble, should be compelled to accept—as a proper determination of their rights on appeal.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The decision of the Circuit Court of Appeals declining to pass upon petitioner's appeal upon the merits is erroneous—for the reason that an order denying the motion to add the Comptroller as an additional party defendant, is not appealable.

City of New York v. Gas Co., 253 U. S. 219.
Oneida Nav. Co. v. Job and Co., 252 U. S. 521.
Van Cott v. DeVries, Inc., 37 F. (2d) 48 (2 C. C. A.).
Central, etc., Co. v. Dunkley Co., 282 Fed. 406 (9 C. C. A.).

II. The decision of the Circuit Court of Appeals is erroneous—for the reason that a general notice of appeal from final judgment, brings up for review all orders and proceedings shown by the record on appeal.

See—
New Rules of Civil Procedure, Rule 75.
Century, etc., Association v. Wickersham, 75 F. (2) 812 (5 C. C. A.).

And see—

Camp v. Mortgage Company, 205 Calif. 380.
Malooly v. York Heating Company, 270 Mich. 240.
Mandelker v. Goldsmith, 177 Wis. 245.

III. The decision of the Circuit Court of Appeals is erroneous—because it denied your petitioner the right to plead and avail himself of the Michigan Statute of Limitations, which this Honorable Supreme Court regards as "a meritorious defense."

See—

Guaranty Trust Co. v. United States, 304 U. S. 126.

IV. The decision of the Circuit Court of Appeals is erroneous—because it denied petitioner a fair determination of the questions raised by his appeal, upon a mere technicality, which is contrary to the uniform policy and practice of this Honorable Supreme Court.

V. The decision of the Circuit Court of Appeals is erroneous—because

(a) Appellee Receiver was advised on January 9, 1939 (R. 76) that Petitioner and Appellant was making the order of December 5, 1938, (denying his motion to add the Comptroller as a party) a part of the record on appeal for review by the Court of Appeals—

See Designation of Record on Appeal, items 8 and 11. Record 76.

(b) Appellee Receiver made no objection to the inclusion on appeal of this order—and had such objection been made then—your Petitioner and Appellant had 90 days from December 5, 1938 (the denial of the motion to add the Comptroller) within which to take a separate appeal therefrom.

(c) Appellee Receiver should, therefore, be held to have waived any objection that your Petitioner and Appellant did not take a separate appeal from this order of December 5, 1938.

(d) No harm was done the Receiver by the failure to take a separate appeal, therefore, your petitioner should not be deprived of any of his rights.

Merrill v. Nat. Bank, 173 U. S. 131.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals, Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

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Frank Wolf,
Appellant,

vs.

B. C. Schram, Receiver of First National
Bank-Detroit,
Appellee

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the decree therein of said Circuit Court of Appeals be reversed by this Court and for such other and further relief as this Court may deem proper.

WILLIAM ALFRED LUCKING,
Attorney for Petitioner Wolf,
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Detroit, Michigan.

IN THE

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OCTOBER TERM, 1940

No.....

FRANK WOLF,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank-Detroit,
Respondent and Appellee below

BRIEF FOR PETITIONER WOLF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF COURTS BELOW

Neither the District Court nor the Circuit Court of Appeals filed any opinion in this case.

II.

JURISDICTION

The date of the decree to be reviewed is March 14th, 1940, when the judgment of the District Court was affirmed by the Circuit Court of Appeals.

Appellate jurisdiction is based upon Section 240 (Amended) of the Judicial Code.

III.

SPECIFICATION OF ERRORS

The errors in the decision of the Circuit Court of Appeals, which are relied upon by petitioner are set out in the statement of "Reasons Relied Upon for the Allowance of Writ" in the accompanying petition for writ of certiorari.

Petitioner relies upon, and will urge before this Court, all of the errors therein assigned.

IV.

STATEMENT OF CASE

I. This appeal is from a judgment taken on December 5th, 1938, by the Appellee Receiver against Appellant Holder of shares of Detroit Bankers Company.

II. The Sixth Circuit Court of Appeals held (1936) in *Barbour v. Thomas,* 86 Fed. (2), 510, that certain parties to that cause, were holders of shares of Detroit Bankers Company and thus were, in effect, actual owners of shares of First National Bank-Detroit, and so liable to assessment by Appellee Bank Receiver.

III. This appeal raises the following questions—not raised in *Barbour v. Thomas, supra,* namely:

A. Since Appellee Receiver now admits (1939) that proceeds of the judgment will be used to *pay interest on deposits* after the Bank's closing—other assets (not assessments) being now sufficient to pay 100% of all the deposits—See Exhibit 4, Record 72—

Are not these suits in reality actions by depositors for "injuries" to property (see *Ticonic Bank v. Sprague,* 303 U. S. 675) and as such

barred by the three year Statute of Limitations of Michigan?

B. Since Appellant Wolf was an actual party to *Backus v. Connolly,* 268 Mich. 495, in which the Michigan Supreme Court held he was liable, as holder of Detroit Bankers Company shares, *only* to the Receiver of Detroit Bankers Company—

And since *Backus v. Connolly, supra,* was commenced, and appellant made a party thereto, and the final decree of the Michigan Supreme Court entered—all before the case at bar against appellant was even started—

is not the judgment of the Michigan Supreme Court conclusive and *res adjudicata* against the appellee Bank Receiver, on the authority of such decisions as *Princess Lida v. Thompson,* U. S. Sup. Ct. 83 L. Ed. 292.

V.

FACTS

I. Double assessment liability of National Bank Stockholders has now been abolished by Congress—never again will this Honorable Court have before it a National Bank Receiver (with enough assets in his hands to pay depositors back in full) attempting to collect interest on deposits from unfortunate stockholders.

II. Appellee Receiver's bill of complaint (Rec. 1) is similar to the one filed in *Barbour v. Thomas,* (86 Fed. (2) 510) and asserts that appellant holders of Detroit Bankers Company shares were in fact owners of shares in First National Bank-Detroit—and thus liable to assessment.

III. The Lower Court, Hon. Arthur F. Lederle, presiding, so held by his Conclusions of Law (R. 27).

IV. Appellant moved for an order making the Comptroller of the Currency a party (R. 28) on the authority of:

Church v. Hubbard, 91 F. (2) 406.
Silk v. Ake, 83 Fed. (2) 618.

V. This motion by appellant to make the Comptroller of the Currency a party was to enable appellant to show that this judgment at bar was

in fact to pay interest on deposits after the closing of the Bank—

that, therefore, it was an action for "injuries" to property and barred by the three year Statute of Limitations of Michigan, Comp. Laws of 1929, of Michigan, Section 13976 (2).

VI. Appellant's motion to file counter claim and make the Comptroller a party (R. 28) was denied by the Lower Court on December 5, 1938 (R. 36) without giving any reasons for such denial.

VII. The Appellant's motion to make the Comptroller a party should have been granted by the Lower Court, for the Honorable Court of Appeals has repeatedly stated, in effect, that if the Comptroller is a party—a stockholder may challenge the enforcement of an assessment.

VIII. And if an assessment is illegal—it may be set aside.

Korbly, Receiver, v. Savings Bank, 245 U. S. 330.

IX. On final hearing, the Receiver's attorney stated:

"The third and last point that they make is that at this time the statement of the bank of the condition of the bank indicates that there are enough assets to pay all liabilities, that the creditors will be paid in full and therefore there is no necessity for the levying of or collection of an assessment.

The Court in *Barbour v. Connolly* has followed a long line of decisions that the decision of the Comptroller as to solvency or insolvency of the bank cannot be collaterally attacked, and that is what this amounts to" (R. 42).

X. So the Appellee Receiver comes before this Court in the position, we believe, of one who deliberately plays hide and seek with appellant—by objecting on final hearing that certain defenses cannot be raised against the Receiver—because his superior officer, the Comptroller is *not* a party—and

then upon motion made to add the Comptroller, the appellee Receiver opposes the motion and keeps the Comptroller out of the case.

VI.

ARGUMENT OF LAW

QUESTION A

Point I

Appellee Bank Receiver recovered judgment on the Comptroller's assessment against First National Bank-Detroit stockholders payable July 31, 1933.

The suit at bar was commenced on January 21st, 1938, —and since the Receiver's right of action accrued July 31, 1933, more than three years elapsed, contrary to the Michigan Statute of Limitations, as follows:

> "13976. Limitation of personal actions; periods. Sec. 13. All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: Provided, however,
>
> * * * * *
>
> "2. Actions to recover damages for injuries to person or property shall be brought within three (3) years from the time said actions accrue, and not afterwards."

A.—Appellant claims that this suit is *essentially* an action by depositors of First National Bank-Detroit, for damages against the Bank for withholding payment of deposits after its closing in February, 1933.

In other words—the Bank Receiver is attempting to collect from appellant for the purpose of paying interest to depositors, as damages, for the detention of their deposits after the closing of the Bank—

Such claims of the depositors are in reality against the Bank,—

for damages for "injuries" to property.

Ticonic National Bank v. Sprague, 303 U. S. 406, 410.

B.—The applicable Statute of Limitations begins to run on July 31, 1933—when the assessment was payable and the cause of action arose.

Strasburger v. Schram, 93 Fed. (2) 246 (U. S. C. A. for D. C.).

C.—In applying the Statute of Limitations of Michigan —Courts will determine who the real party in interest is—and what the essential nature and characteristics of the action are.

United States v. Beebe, 127 U. S. 338, 347.
United States v. Smelser, 87 Fed. (2), 799, 801.
United States v. Railway Co., 142 U. S. 510.
United States, etc. Co. v. Trust Co., 228 Fed. 448, 453 (6 C. C. A.).

In *United States, etc. Co. v. Trust Company, supra,* Judge Denison, said:

> "The case of *United States v. Beebe,* 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, is not persuasive to the contrary. The holding was that the exemption from the statute of limitations will not be allowed when the state, although plaintiff on the record, is only a nominal party having no actual interest. The real purport of this decision is that the form of the record will not determine whether exemption may be claimed, but that the court will look back to the substantial basis of exemption; and it carries more or less implication that if a suit was brought by an individual for the use and benefit of the state, the exemption could be claimed. The instant case is only one step further away in this direction. Instead of suing for the use and benefit of the state, the plaintiff takes over and

> pays for the state's claim and then sues. In the Beebe case, there never had been any real claim by the United States or any right of action in which it had a real interest."

D.—Under these familiar rules—it appears without question that what is being recovered in the case at bar *is exactly "damages"* for the Bank's detention of the depositors' money—after the Bank closed.

The Depositors are the real plaintiffs and the Bank is the real defendant.

If the Bank is unable to pay these damages—then the depositor may claim against those conditionally liable—the stockholders.

But—if the principal debtor (the bank) could not be sued —because the Statute of Limitations has run—then

neither may the guarantors or sureties (or whatever else the conditionally liable stockholders may be called) be sued.

E.—Assume, for instance, that before the closing of the bank—the Bank itself had refused for a period of one year to pay over a depositor's money—and then had paid it to him—

Assume then, that the depositor brought suit against the bank for interest on his deposit, that is, damages for its wrongful detention for the year's time—

and that this suit was started more than three years after the deposit had been repaid.

Obviously such suit is barred by the Michigan Statute of Limitations.

That being so—on the authority of *United States v. Beebe*, 127 U. S. 388, and *Hurst v. Charron*, 267 Michigan, 210, and *Phelps v. Dawson*, 97 Fed. (2), 339 (8 C. C. A.)—the Limitations Statute also bars any recovery against the

stockholders of the Bank—who are conditionally liable for such bank's obligations.

The Bank must first be liable for interest on deposits detained by it—before stockholders of the bank can be held conditionally liable therefor.

Richmond v. Irons, 121 U. S. 27, 64.

In *Richmond v. Irons, supra,* the Supreme Court said:

> "Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself, of course, not in excess of the maximum liability as fixed by the statute."

F.—If a contract liability of a surety on a bond is not enforceable in Michigan against the surety—when the principal is not liable—*under the Hurst v. Charron, supra, rule*—

obviously a mere general statutory (stockholders') secondary or conditional liability could not be enforced either.

G.—And the statutory double liability of stockholders of National Banks under the Acts of Congress is in its essential nature—

"Quasi-contractual in its origin and nature" even though it is created by statute.

Brown v. O'Keefe, 300 U. S. 598, 606.

The stockholders' liability is "secondary" to that of the bank—and cannot exist unless the bank itself is liable—and the State Statute of Limitations is controlling.

McDonald v. Thompson, 184 U. S. 71.

In *McDonald v. Thompson, supra,* the Supreme Court, said:

> "Upon the theory of the plaintiff, if the statute of limitations were pleaded, it would become necessary for the receiver to show that there were outstanding claims against the bank which were not barred by the statute, and therefore that the bill might be maintained."

H.—It is well settled that shareholders of National Banks —when sued on their double liability under the Acts of Congress—

have the same rights and defenses "as any other defendant."

Meeker v. Baxter, 83 Fed. (2) 183, 186 (2 C. C. A.).

And that Receivers of National Banks have no greater rights than their Banks had as going concerns.

Rankin v. Bank, 208 U. S. 541.
Peterson v. Tillinghast, 192 Fed. 287 (6 C. C. A.).

Point II

Appellant stockholder does not question that the four hundred (out of a total of 9,000) stockholders, who were actual parties in *Barbour v. Thomas,* 86 Fed. (2) 510 (6 C. C. A.), were bound by that decision,—

which *only held* that since they were stockholders of the holding company, Detroit Bankers Company, they were, in effect, stockholders of the First National Bank-Detroit, and so liable to assessment under the National Banking Act.

No question of the Statute of Limitations was raised in *Barbour v. Thomas,* or decided.

The case of *Barbour v. Thomas* was tried in the Lower Court in April, 1934.

At that time there was nothing to indicate that the Bank's depositors would be paid out in full—one hundred cents on the dollar.

NOW, however, in January, 1940, when this appeal was heard in the Court of Appeals—

the latest statement of the Receiver of December 31, 1939, shows he has more than sufficient assets to pay all depositors one hundred cents on the dollar—without using the money—

(a) already collected from other stock assessments,

(b) or any assessment money collected from these appellants.

For the Receiver's statement of December 31, 1939, shows:

(a) Uncollected assets (actual value)		$72,319,217.70
(b) Cash on hand		14,372,200.96
Total		$86,691,418.66
(c) Due Depositors,		
Total	$335,960,373.34	
Paid Depositors	272,086,723.11	
Balance Due		63,873,650.23
(d) Other Liabilities		1,164,045.14
		$65,037,695.37
Excess balance of assets over liabilities		21,653,723.29
Less Stock Assessments paid		17,341,822.65
Net Assets over all liabilities and stock assessment collections		$ 4,311,900.64

The Receiver was determined that the appellant should not show in the Lower Court by proper evidence—

that as each month went by—in the liquidation of the Bank's remaining assets—

it becomes increasingly apparent that this Bank never was, in fact, insolvent—and that a terrible injustice was done its stockholders, when it was closed in 1933.

Point III

Under such circumstances—appellant asked permission of the District Court to make the Comptroller of the Currency a party to this case—so he could show these facts—and thus properly rely upon the three year Statute of Limitations of Michigan—

on the theory that:

(a) Such a recovery from appellant must of necessity be to pay interest on deposits after the Bank closed—

which recovery was thus essentially one for damages for "injuries" to property—

See—

Ticonic National Bank v. Sprague, 303 U. S. 406, 410,

and, therefore, was barred after three years by Section 13976 Sub. 2 of Comp. Laws of Michigan of 1929.

(b) Appellant further contended on this point:

(1) That in applying the Statute of Limitations—the real party in interest and the real nature of the action will and must be inquired into.

(2) And that when this is done—it fully appears that *the depositors are the real parties plaintiff and the Bank is the real Defendant*—

(3) And that when this is done—it is manifest that any recovery against appellant stockholder is barred by the three year Limitations Statute of Michigan.

Point IV

But, when appellant sought permission of the Lower Court to show these facts and plead the Statute of Limitations—and to that end—to be permitted to file a proper counter claim and make the Comptroller of the Currency a party—

See his motion filed, November 23, 1938 (R. 28). This motion was denied by the Lower Court on December 5, 1938, without any reasons given—See Record 36.

This denial of appellant's motion and refusal by Judge Lederle to make the Comptroller of the Currency a party—

was erroneous on the authority of—

O'Connor v. Comptroller, 81 F.2 833 (5 C. C. A.); cert. denied 298 U. S. 657.
Bank v. Williams, 252 U. S. 504.

Point V

Appellant calls attention to a most important amendment to the Statutes of Limitations of Michigan.

A. In 1897 and for some years thereafter our Limitation Statutes of Personal Actions provided:

> "(9728) Section 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say:
>
> 1. All actions of debt, founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some

court of record of the United States, or of this, or some other of the United States;

2. All actions upon judgments rendered in any court, other than those above excepted;

3. All actions for arrears of rent;

4. All actions of assumpsit, or upon the case, founded upon any contract or liability express or implied;

5. All actions for waste;

6. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels;

7. All other actions on the case, except actions for slanderous words or for libels."

Section 9728 C. L. of Michigan of 1897.

"(9729) Sec. 2. All actions for trespass upon land, or for assault and battery, or for false imprisonment, and all actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

(9730) Sec. 3. All actions against sheriffs, for the misconduct or neglect of their deputies, shall be commenced within three years next after the cause of action shall accrue, and not afterwards."

Sections 9729 and 9730 C. L. of Michigan of 1897.

It is thus apparent that under the Ticonic case (303 U. S. 406) holding that a recovery of interest, on a closed bank deposit, is an action essentially by a depositor for

"damages for the failure to pay that balance upon demand,"

that under Subdivision 6, of the above (former) Michigan Limitation Statute—this action could have been com-

menced at any time *within six (6) years after July 31, 1933 —when it accrued.*

B. For certainly this action at bar is one for damages for the *"detaining"* of personal property.

And most certainly a claim for money on deposit—is goods or chattels or personal property—

and when it is not paid—it certainly is being "detained."

C. But by Section 13976 of the C. L. of Michigan of 1929—the Michigan Legislature recodified this Statute of Limitations for Personal Actions and expressly required—

(1) That actions for waste—be brought in three years—instead of six years as formerly.

(2) That actions of replevin and trover be brought in three years—instead of six years as formerly—

(3) And that actions for "taking, detaining or injuring goods or chattels"—be brought within three years—instead of six years—

by providing, as follows:

"Limitation of Personal Actions

"13976. Limitation of personal actions; periods. Sec. 13. All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: Provided, however,

1. That actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States, and actions founded upon bonds of public officers, actions founded upon covenants in deeds and mortgages of real estate, may be brought at any time within ten (10) years from the time of the rendition of such judgment,

or the time when the cause of action accrued on such bond or covenant;

2. Actions to recover damages for injuries to person or property shall be brought within three (3) years from the time said actions accrue, and not afterwards;

3. Actions against sheriffs for the misconduct or neglect of themselves, or their deputies, actions for trespass upon lands, for assault and battery, for false imprisonment, for malicious prosecution, for malpractice of physicians, surgeons or dentists, * * * shall be brought within two years from the time the cause of action accrues, and not afterwards. * * *

5. Actions founded upon libel or slander shall be brought within one (1) year from the time the cause of action accrues and not afterwards. * * *"

Sec. 13976 C. L. of Michigan, 1929.

D. And other Limitations of certain actions were changed, namely:

(1) For malicious prosecution and for malpractice—were required to be brought in two years—instead of six years, as formerly.

(2) For neglect or misconduct of Sheriffs or their Deputies—were required to be brought in two years—instead of three years, as formerly—

(3) For libel or slander—were required to be brought within one year—instead of two years—as formerly.

These changes readily appear by a simple comparison of—

(a) Sections 9728, 9729 and 9730 of Compiled Laws of Michigan of 1897—with

(b) Section 13976 of Compiled Laws of Michigan of 1929, above quoted.

E. Thus the Legislature deliberately shortened the time for all actions for damages for "taking, detaining or injuring goods or chattels"—from six years to three years.

F. So when the Michigan legislature amended the wording—

> "taking, detaining, or injuring goods or chattels" (See, 1897 Statute)

to the wording—

> *"actions to recover damages for injuries to person or property."* (See 1929 Statute)

the State obviously intended that all actions—for "detaining" of personal property (formerly to be brought in six years) *must now be brought in three years.*

Since the Ticonic Case (303 U. S. 406) holds squarely that interest on closed bank deposits is

> "damages for the failure to pay that balance on demand"—

obviously, such actions are now all included in the single

> *"cause of action"* for "injury to person or property"

to be brought in three years.

That "property" includes:

(a) Money—see

In re Fixen, 102 Fed. 295 (9 C. C. A.).
In re Electric Co., 99 Fed. 400 (7. C. C. A.).
People v. Williams, 24 Mich. 156.

(b) Deposits—see

Wyatt v. State Board, 74 N. H. 552, 70 A. 387.

A deposit balance after the closing of a bank is a chose in action—which is, of course, personal property.

See—

Gockstetter v. Williams, 9 Fed. (2) 928, 930.
Ex Parte Moore, 6 Fed. (2) 905, 908.

Conclusion of Question A

Since the Courts disregard form and look to substance in order to find the real owner of National Bank shares *(Laurent v. Anderson,* 70 Fed. (2) 819 (6 C. C. A.))

then obviously the Courts will ascertain the real parties in interest—when applying the State Statutes of Limitations—

and so doing—it is found that the action at bar is, in reality, by depositors against the First National Bank-Detroit, as primiarily liable and appellant stockholder, as conditionally liable.

Therefore, under the Michigan Rule laid down by

Hurst v. Charron, 267 Mich. 210—

since the depositors could not recover against First National Bank-Detroit after three years had elapsed from July 31, 1933—

no recovery can be had in the cases at bar by the mere agent of the depositors—the Receiver—

against Appellants, who under certain circumstances are made conditionally liable by the Acts of Congress.

In *Hurst v. Charron, supra,* suit for false imprisonment was instituted against a Sheriff and his surety on the Sheriff's bond.

The suit against the Sheriff was barred by the two year Michigan Statute of Limitations.

Suits on bonds generally may be brought within ten years under the Michigan Statute of Limitations—

the question for the Michigan Supreme Court to decide was whether—

(a) The liability of the surety company was governed by the two year Limitation Statute—applying to suits against the principal on the bond—the sheriff—

(b) or by the ten year statute applying to bonds generally.

The Court held squarely that since the Plaintiff could not recover against the Sheriff (after two years had elapsed) no recovery could be had against the surety.

It is respectfully submitted the suit against appellant was barred on July 31, 1936,—and not having been commenced until on December 5, 1938, the appellee Receiver's judgment must be set aside.

It is further respectfully submitted that the present Michigan Statute of Limitations—Section 13976 Comp. Laws 1929, subdivision (2) providing that all "damages for injuries" to property shall be brought within three years "after the causes of action shall accrue," applies to every action for every kind of damages done to property.

Under *Hurst v. Charron, supra,* the present statute applies to all "causes of action" as

distinguished from the previous Statute of Limitations of Michigan, which applied to "forms of action."

That being so—it is clear that the old wording of the Statute of Limitations of Michigan (Comp. Laws 1897, sec. 9728) namely:

> "* * * and all other actions for taking, detaining or injuring goods or chattels; * * *"

has now been combined and shortened into the present wording of—

> "Actions to recover damages for injuries to person or property."

Therefore, under familiar rules of construction—all old "forms of action" for "taking or detaining" money are now all included in the limitation of "causes of action" for "injuries" to property—and barred in three years.

See—

> *First National Bank v. Hawkins,* 79 Fed. 50, appeal dismissed 97 Fed. 982.

QUESTION B

Is appellant Wolf, who was an actual party to *Backus v. Connolly,* 268 Mich. 495, and governed by the final decrees therein—before the case at bar was even commenced—

protected by the rule of *res adjudicata* from double liability—to the appellee Receiver?

In the record will be found the Lower State Court's final decree in *Backus v. Connolly, supra,* at page 46—and the Supreme Court's final decree, Exhibit 2, page 65 of the record on appeal—

(a) The Lower Court's Decree provided:

> (1) That "the real, actual *bona fide,* outright and beneficial owner of the shares" of the Bank's stock was the Detroit Bankers Company—see paragraph "Sixth" of the decree (R. 55).

(b) The Supreme Court affirmed the Lower Court's decree by its own decree dated October 31, 1934—(R. 65) and specifically decreed that the Detroit Bankers

> Company was the actual and beneficial owner of the Bank's shares, and as such was the stockholder liable under the acts of Congress for the same liability—

now sought to be enforced by the Appellee Receiver (R. 66).

It is respectfully submitted that there cannot be two "actual and beneficial" owners of the same shares of stock —at the same time—

and that as to appellant Wolf—it is *res adjudicata* now —that he was not actual and beneficial owner of any shares of First National Bank-Detroit.

Therefore, since the Bank stock didn't stand in his name on the books of the Bank—he is not liable for any assessment by the Comptroller of the Currency.

The decision in *Backus v. Connolly* (268 Mich. 495) is *res adjudicata* as to appellant's rights and liabilities—and binds appellee Receiver, who had full notice thereof—and was a witness therein.

> *Princess Lida v. Thompson,* U. S. Sup. Ct., 83 L. Ed. 292.

For the filing of the bill or petition in the State Court for dissolution of Detroit Bankers Company—gave that Court prior jurisdiction of all its assets and the power to determine the rights and liabilities of its stockholders.

> *Harkin v. Brundage, et al., Receivers,* 276 U. S. 36.

This rule is peculiarly applicable where the suit first instituted is to settle or liquidate an insolvent estate, as was the case in the dissolving and winding up of the Detroit Bankers (Holding) Company.

See—

> *Farmers Loan & Trust Co. v. R. R. Co.,* 177 U. S. 51, 61.

Brictson Mfg. Co. v. Close, 25 F. (2d) 794, (8 C. C. A.).

Lillard v. Lonergan, 72 F. (2d) 865, (10 C. C. A.), Cert. denied 293 U. S. 615.

Since this case of *Backus v. Connolly, supra,* was commenced before the case at bar—

and the Michigan State Courts thus acquired prior jurisdiction of this question, all creditors and stockholders of the Detroit Bankers Company, being represented in that suit by the State Court Receiver—see,

Machine Co. v. Bank, 93 Mich. 582,

therefore, this decision of the Supreme Court of Michigan is binding—it is very respectfully submitted, as to actual parties in the State Court.

Moreover, the National Bank Receiver (Appellee in the case at bar) was given full notice of the pendency of this Michigan case—the National Bank Receiver was a witness therein—and his counsel, Frank E. Wood and Mr. Levi, Associates of Robert S. Marx, were in Court with the Receiver, and were invited to file briefs before the Michigan Supreme Court. (See pages 49 and 50 of the Record in *Backus v. Connolly, supra,* of which this Court will take judicial notice.)

As to the binding effect of notice and the opportunity to file briefs accorded the appellee Receiver in the State Courts, see

Adams Express Co. v. Ohio, 165 U. S. 194, 199, 219,

and same case in the Sixth Circuit Court of Appeals reported in 69 Fed. 546, at page 549.

Barbour v. Thomas, 86 F. (2d) 510 (6 C. C. A.) Discussed

It was there held that *as to the stockholders of Detroit Bankers Company actually parties in that case,* they were the actual, real owners of Bank shares—and so liable to assessment under the Acts of Congress.

On the other hand—as to the parties actually before it in *Backus v. Connolly, supra,* of whom appellant is one, the Supreme Court of Michigan held just the contrary—

and that the actual, real owner of all the Bank shares was the Detroit Bankers Company—

the same one in whose name stood all the shares of the Bank—upon the books of the Bank.

Therefore, under the rules laid down in *Princess Lida v. Thompson, supra,* the Appellee Receiver cannot recover against appellant—actual party to *Backus v. Connolly, supra*—the final decree in which was entered over four years before the case at bar was started.

IN CONCLUSION, it is most respectfully submitted to this Honorable Supreme Court that the judgment and order of the United States Circuit Court of Appeals for the Sixth Circuit entered March 14, 1940, is manifestly erroneous because—

(a) The case at bar was expressly admitted by the Receiver's attorneys on the trial, not to be a part of the so-called class suit of *Barbour v. Thomas, supra,* and it was further expressly admitted by Receiver's attorneys that Mr. Wolf was not bound by the *Barbour v. Thomas* decision —see Mr. Runge's statement on page 41 of the Record.

(b) That being so, the decision of the Court of Appeals in the case at bar was based upon an erroneous, bare tech-

nicality—namely: that Mr. Wolf did not take a separate appeal from the interlocutory order refusing to make the Comptroller of the Currency a party defendant.

This ruling, it is submitted, not only is erroneous as a matter of law—but plainly violates the spirit of this Court's new rules of Civil Procedure.

See Rules 1 and 61.

Most respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 137

FRANK WOLF,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank - Detroit,
Respondent and Appellee below

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

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IN THE

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Respondent and Appellee below

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petition for writ of certiorari should be denied. It amounts to nothing more than a plain attempt to relitigate, *on the same record,* a decision *in a class action,* rendered April 9, 1934, by the United States District Court for the Eastern District of Michigan, Southern Division. *Barbour v. Thomas,* 7 Fed. Supp. 271. This was affirmed without

dissent by the United States Circuit Court of Appeals for the Sixth Circuit in two opinions. *Barbour v. Thomas* (1936), 86 Fed. (2d) 510; *Ullrich v. Thomas* (1936), 86 Fed. (2d) 678. As to this decision, this Court has already twice denied certiorari. *Barbour v. Thomas* (1937), 300 U. S. 670; *Ullrich v. Thomas* (1937), 301 U. S. 692.

In the *Barbour* and *Ullrich* cases above cited, it was decided that the stockholders of Detroit Bankers Company, a bank stock holding corporation, were liable for their proportionate part of the national bank assessment levied by the Comptroller of the Currency of the United States on the shares of the insolvent First National Bank-Detroit. In the instant case, the Receiver of First National Bank-Detroit brought suit against the petitioner, Frank Wolf, to recover his proportionate part of said national bank stock assessment, based upon his admitted ownership of Detroit Bankers shares.

First National Bank-Detroit failed February 11, 1933. Its liabilities were over four hundred million dollars, upon which at this date dividends of only eighty percent have been paid. Its capital was twenty-five million dollars and on this capital the Comptroller of the Currency, on May 11, 1933, levied an assessment of one hundred percent, payable July 31, 1933.

All the capital stock of First National Bank-Detroit, except directors qualifying shares, stood in the name of a bank stock holding company, Detroit Bankers Company, which, hopelessly insolvent, failed at the same time that the bank failed. Since nothing on account of the First National stock assessment could be collected from the defunct holding company, the bank Receiver promptly demanded payment proportionately from the stockholders of the holding company.

The holding company had been formed by exchanging bank shares for holding company shares. No cash or other capital had been paid into the holding company. Its only assets were the bank stocks for which it exchanged its own shares. Referred to on the face of each holding company stock certificate and printed in full in bold type on the back thereof was the following excerpt from the articles of association (article IX-A) of the holding company (R. 7):

> "The holder of each share of Common Stock of this corporation shall be individually and severally liable for such stockholder's ratable and proportionate part (determined on the basis of their respective stockholdings of the total issued and outstanding stock of this corporation) for any statutory liability imposed upon this corporation by reason of its ownership of shares of capital stock of any bank or trust company, and the stockholders of this company—by the acceptance of their certificates of stock of this company—severally agree that such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized or operate. A list of the stockholders of this company shall be filed with the Banking Commissioner of Michigan or the Comptroller of the Currency, whenever requested by either of those officers."

Before the bank assessment above referred to was due, approximately four hundred holding company stockholders, as complainants and interveners, with a combined assessment liability of about four million dollars, filed as a test case a class action in equity on behalf of themselves and all other holding company stockholders, in the United States District Court at Detroit, to enjoin the bank Receiver from making any attempt at law or otherwise to collect the assessment from the holding company stockholders. In such

class suit an interlocutory injunction was granted on the filing of the bill, July 12, 1933, in favor of all the holding company stockholders, whether they were actual parties to the suit or not. This interlocutory injunction continued in force to the advantage of the petitioner Wolf, as well as all other holding company stockholders, until the case was tried and decided on its merits. The bank Receiver, in addition to an answer, filed a cross-petition affirmatively seeking judgment against each holding company stockholder who was a party to the case. Honorable Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, was designated by the Honorable Chief Justice of this Court to try the case. The trial lasted many weeks. The record, as condensed and printed on appeal, consisted of 13 volumes comprising approximately 5800 pages. Throughout the trial both sides considered the case as a class suit and as a test case to determine as to all holding company stockholders whether or not they were proportionately liable for the First National Bank-Detroit assessment. Judge Hayes held that they were liable to the bank Receiver, made elaborate findings of fact and conclusions of law, wrote an excellent and full opinion, and entered a final decree accordingly. *Barbour v. Thomas* (1934), 7 Fed. Supp. 271.

The holding company stockholders promptly perfected an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. The receiver of the holding company, also a party defendant below, took a cross-appeal. One of the holding company stockholders, a named party in that case and represented by the same counsel now appearing for petitioner here, took an independent appeal. The United States Circuit Court of Appeals affirmed the District Court on the main appeal and on the cross-appeal, *Barbour v. Thomas* (1936), 86 Fed. (2d) 510; and also affirmed the District Court on the independent appeal.

Ullrich v. Thomas (1936), 86 Fed. (2d) 678. On the main and cross-appeals, petitions for certiorari were denied by this Court. *Barbour v. Thomas* (1937), 300 U. S. 670. On the independent appeal a separate petition for certiorari was also denied by this Court. *Ullrich v. Thomas* (1937), 301 U. S. 692.

All of the 8,000 holding company stockholders, except petitioner Frank Wolf and a handful of others represented by the same counsel, have recognized the finality of the decisions in the *Barbour* and *Ullrich* cases. The decisions of the District Court and the Court of Appeals in these two cases have been cited with approval many times. *Adams v. Nagle* (1938), 303 U. S. 532, 541; *MacPherson v. Schram* (C. C. A. 5, 1940), 112 Fed. (2d) 674, 675; *Gillespie v. Schram* (C. C. A. 6, 1939), 108 Fed. (2d) 39, 41; *Munro v. Post* (C. C. A. 2, 1939), 102 Fed. (2d) 686, 687; *Smith v. Witherow* (C. C. A. 3, 1939), 102 Fed. (2d) 638, 643; *Commissioner of Internal Revenue v. Carey-Reed Co.* (C. C. A. 6, 1939), 101 Fed. (2d) 602, 604; *Schram v. Leyda* (C. C. A. 9, 1938), 97 Fed. (2d) 665; *Schram v. Smith* (C. C. A. 9, 1938), 97 Fed. (2d) 662; *Schram v. Poole* (C. C. A. 9, 1938), 97 Fed. (2d) 566, 569; *Erickson v. Slomer* (C. C. A. 7, 1938), 94 Fed. (2d) 437, 439; *Nettles v. Rhett* (C. C. A. 4, 1938), 94 Fed. (2d) 42, 47, 48; *Moss v. Furlong* (C. C. A. 6, 1937), 93 Fed. (2d) 182, 183; *Church v. Hubbard* (C. C. A. 6, 1937), 91 Fed. (2d) 406, 408; *Union Guardian Trust Co. v. Schram* (C. C. A. 6, 1937), 86 Fed. (2d) 1015; *Erickson v. Richardson* (C. C. A. 9, 1936), 86 Fed. (2d) 963, 966; *Atherton v. Anderson* (C. C. A. 6, 1936), 86 Fed. (2d) 518, 534; *Schram v. Collins* (D. C. Mich. 1939), 30 Fed. Supp. 783, 784; *Anderson v. Abbott* (D. C. Ky. 1938), 23 Fed. Supp. 265, 268, 271; *Anderson v. Atkinson* (D. C. Ill. 1938), 22 Fed. Supp. 853, 862; *Powell v. Malone* (D. C., N. C., 1938), 22 Fed. Supp. 300, 302; *Gerber v. Gossweyler* (D. C., N. Y., 1937), 18 Fed. Supp. 925, 927; *Drake v. Dilatush* (D. C. Ill. 1936),

16 Fed. Supp. 120, 123; *Hanley v. Corwin* (D. C., N. Y., 1936), 15 Fed. Supp. 396, 397; *Pottorff v. Dean* (D. C. Mass. 1934), 8 Fed. Supp. 670, 672; *Schram v. Keane* (1938), 279 N. Y. 227, 231, 18 N. E. (2d) 136, 138; *Hanson v. Agnew* (1938), 195 Wash. 354, 369, 80 Pac. (2d) 845, 852; *Burrow v. Emery* (1938), 285 Mich. 86, 96, 280 N. W. 120, 123; *White v. Aaronson* (1938), 169 Misc. (N. Y.) 593, 594, 7 N. Y. S. (2d) 901, 902.

Notwithstanding the *Barbour* and *Ullrich* cases, petitioner Wolf persisted in his refusal to pay the assessment. The bank Receiver then brought the instant suit against him. The bill of complaint was substantially identical to the Receiver's cross-bill in the *Barbour* case. All of the facts alleged in the complaint were admitted by answer (R. 14), or in the stipulation of facts (R. 18). The stipulation provides that the "facts as found" in *Barbour v. Thomas* "are part of the facts in this case" (R. 20).

COMMENT ON "REASONS RELIED ON FOR ALLOWANCE OF WRIT"

I. Under the above caption the petitioner, at page 5 of his brief, states that the Circuit Court of Appeals declined to pass upon the merits of his appeal. This statement is unwarranted. Because the case was conceded to be identical to *Barbour v. Thomas* (D. C. Mich. 1934), 7 Fed. Supp. 271; (C. C. A. 6, 1937) 86 Fed. (2d) 510; cert. den. 300 U. S. 670; and on the same record, a *per curiam* opinion was handed down. *Wolf v. Schram*, 111 Fed. (2d) 146 (R. 94). This does not mean, however, that the appeal was not decided on its merits. The case was not disposed of on a summary motion. It was thoroughly briefed and fully argued and decided on the merits.

A belated attempt to differentiate the *Wolf* case from the *Barbour* and *Ullrich* cases was made by counsel for Wolf, after the District Court decision had been announced, by filing a motion to make the Comptroller of the Currency a party. This motion was denied and from the denial no appeal was taken. A casual reading of the motion (R. 28) will disclose that it is without merit. It is simply an indirect method of attempting to defend a stock assessment suit by making a collateral attack on the assessment itself.

II. If we assume that petitioner did appeal from the District Court order denying his motion to make the Comptroller of the Currency a party, there is no error in the judgment of the Circuit Court of Appeals because it is elementary that the Comptroller of the Currency is not a necessary or proper party to a suit brought by a national bank receiver against a national bank stockholder for the recovery of a stock assessment. 12 U. S. C. A., sec. 192; *Richmond v. Irons* (1887), 121 U. S. 27, 49. It was certainly not necessary to make the Comptroller of the Currency a party in order to plead the statute of limitations. It is equally clear that the collateral attack on the necessity for the assessment cannot be pleaded as a defense to a stock assessment suit. *Adams v. Nagle* (1938), 303 U. S. 532; *Forrest v. Jack* (1935), 294 U. S. 158; *Kennedy v. Gibson* (1869), 8 Wall. 498.

III. It is claimed that petitioner was denied the right to plead the Michigan three-year statute of limitations. It is obvious that the three-year statute of limitations does not apply. The appropriate Michigan statute, Section 13976, Compiled Laws of Michigan, 1929, reads:

> "All actions in any of the courts of this state shall be commenced within six years next after the cause of action shall accrue, and not afterward, except as hereinafter specified."

It is conceded that the suit was brought well within six years. One of the exceptions, and the one relied on to the above quoted general statute, reads:

> "Actions to recover *damages for injuries to person or property* shall be brought within three years from the time said actions accrue, and not afterwards." (Italics ours.)

How anyone could seriously contend that a national bank receiver's suit to collect a liability imposed by a federal statute upon the bank stockholder is an action "to recover damages for injuries to person or property" is difficult to understand. The Receiver's petition makes no claim for damages to his "person or property," which means, as is obvious, a tort claim arising from physical injury to a person or to his specific property. *Sweet v. Sweet* (1933), 262 Mich. 432, 247 N. W. 711. The Receiver is asking the bank stockholder to pay a liability imposed by statute and which, in addition, arises *ex contractu* by reason of the articles of association of the holding company, heretofore quoted.

IV, V. Reasons relied on numbered IV and V set forth the same subject matter contained in reasons I, II and III. The pleadings and proceedings in the District Court below plainly show that the case was tried on the ground of *res adjudicata* and on the claim that the bank is now solvent, and also plainly show that there was not any intimation of the defense of the statute of limitations. After the District Court had decided the case and handed down its findings of fact and conclusions of law in favor of the Receiver, petitioner then sought permission to make the Comptroller of the Currency a party, with leave to file an injunction against him, in which reference was first made to a possible defense of the statute of limitations. No appeal was taken to the court's action in this respect, and in the brief in the

Circuit Court of Appeals petitioner did not even contend that the District Court erred in denying the motion to make the Comptroller a party. The argument was tardily presented in a reply brief, and in a supplemental reply brief, filed after the argument.

The case of petitioner, including the tardily presented idea of the statute of limitations as a defense, is founded solely upon the claim that the Receiver now has sufficient assets to pay the depositors of the bank in full. This claim is gleaned from an estimate as to what future liquidation of the First National Bank-Detroit assets may produce, including further stock assessment collections. The claimed solvency of First National Bank-Detroit as a defense to the stock assessment in question was raised and disposed of in the *Barbour v. Thomas, supra,* litigation. Further, this Court has often refused to give any validity to any assessment defense resting upon an alleged excess of assets over liabilities. *Casey v. Galli* (1877), 94 U. S. 67; *Adams v. Nagle* (1938), 303 U. S. 532.

Such question as petitioner attempts to inject into this case with regard to the decision in *Backus v. Connolly* (1934), 268 Mich. 495, 256 N. W. 496, was similarly raised in the Sixth Circuit Court of Appeals by petitioner's and the other counsel who participated in the *Barbour* and *Ullrich* cases. It was clearly and completely disposed of there. *Barbour v. Thomas* (C. C. A. 6, 1936), 86 Fed. (2d) 510, 517 [cert. den., 300 U. S. 670].

CONCLUSION

It was decided in the *Barbour* and *Ullrich* cases that the holders of Detroit Bankers stock were each liable for their proportionate part of the First National Bank stock assessment. These decisions were rendered upon complete pleadings, a full trial and a complete and extensive record. Petitioner now asks this Court, after it has twice denied certiorari and after the holding company stockholders have paid approximately twenty million dollars on account of the assessment, to reverse in principle the *Barbour* and *Ullrich* decisions on substantially the identical, though abbreviated record, in these previous cases. As a defense he seeks to utilize the twenty million dollars that his fellow stockholders have paid to the bank Receiver in order to substantiate his claim that the bank is now solvent. He disregards the fact that it was declared insolvent by the Comptroller of the Currency more than seven years ago, and that even to this date the depositors have only been paid eighty percent on their claims.

Respectfully submitted,

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ROBERT S. MARX,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 138

MARGARET HOLMES DAVIS,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank-Detroit,
Respondent and Appellee below

PETITION OF MARGARET HOLMES DAVIS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

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B. C. SCHRAM, Receiver of First National Bank-Detroit,
Respondent and Appellee below

PETITION OF MARGARET HOLMES DAVIS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: The Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

I. Petitioner was the owner in 1933, of certain shares of Detroit Bankers Company.

II. The Honorable United States Circuit Court of Appeals for the Sixth Circuit held in 1936, that the owners of Detroit Bankers Company shares, were liable to assessment as the actual owners of the shares of First National Bank-Detroit.

See—*Barbour v. Thomas,* 86 F. (2) 510.

III. Receiver Schram brought suit against petitioner on January 21st, 1938, to collect this assessment liability from her.

IV. Petitioner and Appellant claimed in the Lower Court that the Receiver had sufficient assets in his hands (without collecting any assessment liability from Petitioner) with which to pay all depositors one hundred cents on the dollar—and that, therefore,

(a) The Receivers suit was, of necessity, one to collect interest on the deposits of the closed bank.

(b) And, that as such, it was a suit for damages for the detention of the depositors' money.

See—*Ticonic National Bank v. Sprague,* 303 U. S. 406, 410.

(c) And so, under the Statute of Limitations of Michigan, was barred three years after July 31, 1933.

V. And Petitioner asked leave of the District Court, to make the Comptroller of the Currency a party defendant in the Receiver's suit against her—so that she could show that the Receiver was merely collecting interest on deposits (over 100 per cent of the principal) and thus damages for detention of the depositors' money—

which suit for damages was barred by the Michigan Limitation Statutes, as she claimed.

And Petitioner and Appellant sought to have said Comptroller of the Currency made a party in the Michigan District Court—for that purpose—on the authority of—

O'Connor v. Comptroller, 81 Fed. (2) 833 (5 C. C. A.), Cert. denied 298 U. S. 657.
First Nat. Bank v. Williams, 252 U. S. 504.

in order that Petitioner might bring herself within the rule of *Crawford v. Gamble,* 57 Fed. (2) 15, 17 (6 C. C. A.), where it was said:

"If it should be true as alleged that the note was executed to secure the New Bank against loss on account of assets received from the Old Bank, but that such assets actually equal in value the amount at which they were turned over, and that therefore no necessity exists for an assessment to pay the note, then upon these facts being brought home to the proper authorities appellant may doubtless be granted appropriate relief."

VI. The Lower District Court, on December 5, 1938, denied Petitioner's said Motion to make the Comptroller a party—without stating reasons for his denial.

(Record on Appeal, page 36.)

VII. Upon the entry of judgment for the Receiver, Petitioner and Appellant appealed generally from the judgment entered against her in the District Court.

See her Notice of Appeal—Record on Appeal, page 75.

VIII. But the Circuit Court of Appeals for the Sixth Circuit entered judgment on March 14, 1940, affirming the Lower Court's judgment—without any opinion on the merits—by an order as follows:

"Before Hicks, Allen and Arant.

This case came on for hearing upon the record, briefs and arguments of counsel, and it appearing that it arises out of the same state of facts as *Barbour v. Thomas,* 86 F. (2d) 510, a class suit decided by this Court; and it appearing that a motion that the Comptroller of the Currency of the United States be made a party to this suit was denied and no appeal taken therefrom;

It is ordered and adjudged that the order and judgment of the District Court be affirmed.

Approved for entry:

H. W. Arant
United States Circuit Judge

Filed: March 14, 1940."

IX. And your Petitioner and Appellant most respectfully submits to this Honorable Supreme Court—

that such a disposition of her Appeal is unjustified, and one which no litigant in any United States Court, however humble, should be compelled to accept—as a proper determination of their rights on appeal.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The decision of the Circuit Court of Appeals declining to pass upon petitioner's appeal upon the merits is erroneous—for the reason that an order denying the motion to add the Comptroller as an additional party defendant, is not appealable.

City of New York v. Gas Co., 253 U. S. 219.
Oneida Nav. Co. v. Job and Co., 252 U. S. 521.
Van Cott v. DeVries, Inc., 37 F. (2d) 48 (2 C. C. A.).
Central, etc., Co. v. Dunkley Co., 282 Fed. 406 (9 C. C. A.).

II. The decision of the Circuit Court of Appeals is erroneous—for the reason that a general notice of appeal from final judgment, brings up for review all orders and proceedings shown by the record on appeal.

See—

New Rules of Civil Procedure, Rule 75.
Century, etc., Association v. Wickersham, 75 F. (2) 812 (5 C. C. A.).

And see—

Camp v. Mortgage Company, 205 Calif. 380.
Malooly v. York Heating Company, 270 Mich. 240.
Mandelker v. Goldsmith, 177 Wis. 245.

III. The decision of the Circuit Court of Appeals is erroneous—because it denied your petitioner the right to plead and avail herself of the Michigan Statute of Limitations, which this Honorable Supreme Court regards as "a meritorious defense."

See—

Guaranty Trust Co. v. United States, 304 U. S. 126.

IV. The decision of the Circuit Court of Appeals is erroneous—because it denied petitioner a fair determination of the questions raised by her appeal, upon a mere technicality, which is contrary to the uniform policy and practice of this Honorable Supreme Court.

V. The decision of the Circuit Court of Appeals is erroneous—because

(a) Appellee Receiver was advised on January 9, 1939 (R. 76) that Petitioner and Appellant was making the order of December 5, 1938, (denying her motion to add the Comptroller as a party) a part of the record on appeal for review by the Court of Appeals—

See Designation of Record on Appeal, items 8 and 11. Record 76.

(b) Appellee Receiver made no objection to the inclusion on appeal of this order—and had such objection been made then—your Petitioner and Appellant had 90 days from December 5, 1938 (the denial of the motion to add the Comptroller) within which to take a separate appeal therefrom.

(c) Appellee Receiver should, therefore, be held to have waived any objection that your Petitioner and Appellant did not take a separate appeal from this order of December 5, 1938.

(d) No harm was done the Receiver by the failure to take a separate appeal, therefore, your petitioner should not be deprived of any of her rights.

Merrill v. Nat. Bank, 173 U. S. 131.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals, Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 8216
Margaret Holmes Davis,
Appellant,

vs.

B. C. Schram, Receiver of First National
Bank-Detroit,
Appellee

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the decree therein of said Circuit Court of Appeals be reversed by this Court and for such other and further relief as this Court may deem proper.

WILLIAM ALFRED LUCKING,
Attorney for Petitioner Davis,
3114 Union Guardian Building,
Detroit, Michigan.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

MARGARET HOLMES DAVIS,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank-Detroit,
Respondent and Appellee below

BRIEF FOR PETITIONER DAVIS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF COURTS BELOW

Neither the District Court nor the Circuit Court of Appeals filed any opinion in this case.

II.

JURISDICTION

The date of the decree to be reviewed is March 14th, 1940, when the judgment of the District Court was affirmed by the Circuit Court of Appeals.

Appellate jurisdiction is based upon Section 240 (Amended) of the Judicial Code.

III.

SPECIFICATION OF ERRORS

The errors in the decision of the Circuit Court of Appeals, which are relied upon by petitioner are set out in the statement of "Reasons Relied Upon for the Allowance of Writ" in the accompanying petition for writ of certiorari.

Petitioner relies upon, and will urge before this Court, all of the errors therein assigned.

IV.

Petitioner most respectfully shows that her Petition for Writ of Certiorari is in all respects the same as that presented to this Honorable Court by Petitioner Frank Wolf, and that in the Circuit Court of Appeals for the Sixth Circuit, her appeal was heard and decided, by the order of that Court, upon the Printed Record filed in the cause of Frank Wolf, Appellant, vs. B. C. Schram, Receiver, Appellee—said causes being numbered 8215 and 8216 in said Court.

Petitioner, therefore, asks leave of this Court to present her said Petition for Writ of Certiorari upon the said Brief and Record filed in this Honorable Supreme Court, by the said Frank Wolf.

Respectfully submitted,

WILLIAM ALFRED LUCKING,
Attorney for Petitioner Davis,
3114 Union Guardian Building,
Detroit, Michigan.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 138

MARGARET HOLMES DAVIS,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank - Detroit,
Respondent and Appellee below

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

FRANK B. WOOD,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 138

MARGARET HOLMES DAVIS,
Petitioner and Appellant below,
vs.
B. C. SCHRAM, Receiver of First National Bank - Detroit,
Respondent and Appellee below

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Petition of Margaret Holmes Davis for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit arises out of a companion case to that in which a similar Writ is sought by Petitioner Frank Wolf (No. 137). These Petitions are based upon a combined

Transcript of Record filed with this Court. The two cases present identical issues and the *per curiam* opinion of the Sixth Circuit Court of Appeals in the instant case is likewise identical with that in the *Wolf* case (R. 94). *Davis v. Schram*, 111 Fed. (2d) 144; *Wolf v. Schram*, 111 Fed. (2d) 146.

For the same reasons advanced by respondent in opposition to a granting of the Petition of Frank Wolf, it is respectfully urged that the Petition of Margaret Holmes Davis should be denied.

The attention of this Court is respectfully called to the Brief of Respondent in Opposition to the Petition of Frank Wolf for a statement of these reasons.

Respectfully submitted,

FRANK E. WOOD,

ROBERT S. MARX,

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900 Traction Building,
Cincinnati, Ohio.